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Supreme Court, U.S.
FILED
MAY 5 - 2004
OFFICE OF THE CLERK

No. 03-1247

In the

Supreme Court of the United States

ELLEN L. BATZEL, a citizen of the State of California,

Petitioner,

v.

ROBERT SMITH, a citizen of the State of North Carolina;
TON CREMERS, a citizen or subject of the Netherlands;
MOSLER, INC., a Delaware corporation
with its principal place of business in Ohio,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT TON CREMERS

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly held, in accordance with every other Court of Appeals that has addressed the question, that the Communications Decency Act, 47 U.S.C. § 230 (the "Act"), provides immunity for Internet service providers and users who actively select materials provided by third parties for publication.

2. Whether the Ninth Circuit correctly held, as a matter of first impression in the Court of Appeals, that the Act provides immunity for Internet service providers and users who publish information supplied by third parties in circumstances where a reasonable person would conclude that the information was provided for publication on the Internet or other interactive computer service.

3. Whether an Internet or interactive computer service provider or user who publishes information provided by a third party can be subject to liability as a distributor, rather than be given immunity under the Act – an issue neither raised by the Petitioner before nor passed on by the Ninth Circuit.

4. Whether the Ninth Circuit correctly applied this Court's established collateral order doctrine in concluding that it should hear an interlocutory appeal from a denial of a special motion to strike made under the California Strategic Litigation Against Public Participation statute, California Code of Civil Procedure § 425.16 (an "anti-SLAPP Motion").

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STATEMENT OF THE CASE

I. Legal Background

The advent of the Internet and the World Wide Web made possible the efficient collection and dissemination of information to persons with a common interest. This has allowed the development of services such as Ton Cremers's Museum Security Network (the "Network"), which receives information about stolen art from sources around the world and posts it on an Internet Website and listserv to interested professionals at museums, law enforcement agencies, and elsewhere. Many such services add value to the information by trying to weed out offensive or irrelevant submissions, either by exercising general discretion (*e.g.*, using automated screening technology) or specific discretion (*e.g.*, human review of each submission). Under the law of many states prior to the development of the Internet, such review – which both increases the value provided to users and reduces the potential for abuse – exposed the service provider to potential tort liability, which would not exist if the submissions were simply retransmitted without review.

To modernize the law and maximize the benefits provided by these types of Internet services, Congress enacted 47 U.S.C. § 230, which eliminated tort liability for service providers and users who publish information provided by another. Section 230 is central to the dispute in this matter, as further described below.

II. Factual Background

The case centers on an e-mail from Bob Smith to Cremers's Network, stating that the Petitioner was in possession of art possibly stolen from the Jews in World War II by the Nazis, which Cremers posted on the Network.

Smith was a building contractor who performed work for Petitioner. *See* Petition Appendix ("Pet. App.") at 16a. Smith testified that during conversations with Petitioner, she told him about her history of manic depression and stated that she was "the granddaughter of one of Adolf Hitler's right hand men." R0094-95. Smith testified that on another occasion he heard Petitioner say that Heinrich Himmel was her Nazi ancestor. R0096-97, 0103-08. Smith stated that while visiting Petitioner's residences, he noticed many old paintings that appeared to be of European origin. R0114-15. He concluded that these paintings might be art stolen by the Nazis from the Jews during World War II. R0118-19.

Smith testified that he began to do research on the Internet and discovered the Network. Smith noted that "They had a large amount of information posted about recovered artwork that had been stolen and about artwork that had been looted during the Nazi occupations." R0198.

The Network, operated by Cremers, is an Internet-based "bulletin board" and electronic distribution list ("listserv") which publishes e-mails, news articles and other materials from third parties about museum security and stolen art. Pet. App. at 18a. The purpose of the Network is to aid in the investigation of art crimes by publishing relevant information to the museum security personnel, security consultants, law enforcement officials, private investigators and insurance company investigators who subscribe to the Network. *See* R0358 (letter from office of Attorney General of Mexico stating Cremers's postings "help start investigations"); R0393 (letter from Chief Conservator, National Gallery of Victoria, Melbourne, Australia stating that the Gallery had used Cremers's postings regarding "items which changed hands during the Nazi era" to research "possible links" in its collection); R0395 (letter from Nick Goodman stating Cremers's postings are "very valuable" in his research on "paintings that are still missing from my

family's collection that were looted during WWII"); R0465 (letter from New Mexico Museum of Natural History & Science stating, "Recently, a piece was stolen from a show in Tuscon. I would not have found out about this without the security network"). The Network has been recognized by the Smithsonian and by other art and cultural institutions as a major factor in cultural property protection and in the detection and prevention of art crime. *See*, *e.g.*, R0339; 0342-43, 0365, 0377, 0427, 0454, 0457 & 0506.

Reports related to art generally are posted as they are received. *See* R0936. The Network prominently displays a disclaimer stating that the Network "is providing its Website and its contents on an "as is" basis and makes no representations or warranties of any kinds with respect to its Website and mailinglist or its contents." The disclaimer further states that the Network does not represent or warrant that the information accessible *via* its Website and mailing list is "accurate, complete or current." *Id.* The disclaimer concludes with the statement: "While every attempt is made for accuracy, the publisher of this web site cannot be held responsible for incorrect information at this web site." *Id.*

On September 10, 1999, Smith sent an e-mail to the Network addressed to "securma@museum-security.org". Contrary to Petitioner's claim, this was an e-mail address at which Cremers frequently received submissions that he posted to the Network. Petition at 6; *see*, *e.g.*, R0362; R0365; R0366; R0370; R0372; R0373; R0374-79.

The e-mail reported that Petitioner had "bragged to [Smith] about being the granddaughter of 'one of Adolph Hitler's right-hand men'" and Smith "believe[d] she said she was the descendant of Heinrich Himmler." Pet. App. at 17a-18a. The e-mail further stated that Petitioner had "hundreds of older European paintings on her walls" and that he "believe[d] these paintings were looted during WWII and are

the rightful legacy of the Jewish people." Pet. App. at 18a.

Smith's e-mail concluded as follows:

> I do not know who to contact about this, so I start with your organization. Please contact me via e-mail [. . .] if you would like to discuss this matter.

Pet. App. at 18a.

Petitioner claims that certain details in the e-mail are false – for example, that Smith only saw paintings while they were still in packing materials before she hung them on her walls, and the manner in which she told him about her Nazi ancestry was not in a bragging tone. Petition at 5. However, during his deposition by Petitioner's counsel, Smith stood behind the basic elements of his e-mail and affirmed that, based on Petitioner's statements about her heritage and his observations of her painting, he believed in good faith that Petitioner was in possession of artwork the Nazis had stolen from the victims of the European Holocaust. R0118-19.

Following his normal practice, after receiving Smith's e-mail, Cremers published it on the Network. Pet. App. at 19a. Contrary to Petitioner's claim, the heading "Stolen Art" used for the Smith e-mail was not written by Cremers, but was the title given by Smith to his e-mail. Petition at 5-6; Pet. App. at 17a. Cremers also asked for comments from Network subscribers to the e-mail. R0310.

Cremers in fact received and posted on the Network several comments to the Smith e-mail, some of which were critical of its contents. *See, e.g.*, R0287. Petitioner claims that Cremers never apologized for the posting and did not delete the e-mail until months later. Petition at 7. Actually, on September 13, after receiving an e-mail from a Network

subscriber which alerted Cremers that the Smith e-mail contained Petitioner's identifying information (R840-41, 933-34), Cremers deleted Petitioner's identifying information from the Network's computerized archive and wrote and posted an apology. R0841.

Petitioner claims that Smith did not intend his e-mail to be published on the Network. Petition at 6. This claim is belied by, among other things, Smith's own statements after the e-mail was published. For example, in a September 14, 1999 e-mail which he wrote in response to an inquiry by the Network, Smith indicated that he had seen the postings on the Network in response to his e-mail and feigned "confusion" that his e-mail had been published. R0294-95. However Smith "refrain[ed] from posting an apology." Instead he stated: "In regards to my suspicions about a certain evil lawyer, [i]f your contacts return reasons for investigating further then I will be happy to provide any help that I can . . . . [P]lease let me know one way or the other when your hear anything." *Id.*

Smith also has stood behind the substance of the statements in his e-mail, with only minor corrections. For example, even in January 2000, after Petitioner had threatened to sue Smith for posting the e-mail, Smith maintained that "the statements I wrote are true" and suggested someone investigate Petitioner's claims about her lineage. R0299; *see also* R0118-19.

Petitioner's claim that Cremers did not publish a retraction of Smith's statements is misleading. Petition at 7. In fact, Cremers has repeatedly offered to permit Petitioner to publish her own statement concerning the Smith e-mail on

the Network. R0933, R0954. Petitioner has refused to take advantage of this offer. R0952.[1]

III. Procedural History

In her complaint filed in the United States District Court for the Central District of California, Petitioner alleges that Respondent Cremers defamed her through publication on the Network Website and listserv of an e-mail received from third party Smith, which purportedly contained defamatory statements about Petitioner. Petitioner alleges that Cremers should be liable for the transmission of Smith's statement because Cremers exercises some discretion in determining what e-mails and information he receives are distributed to Network subscribers.

Cremers brought a motion to dismiss under the California Strategic Litigation Against Public Participation statute, California Code of Civil Procedure § 425.16 (an "anti-SLAPP Motion"). California Code of Civil Procedure § 425.16 permits early dismissal of suits that have the purpose or effect of chilling the exercise of free speech, unless the plaintiff demonstrates a "probability" of prevailing on the claim. The District Court agreed that the suit implicated Cremers' free speech rights, but concluded that Petitioner had demonstrated a "probability" that she would prevail on her claim. The District Court's ruling was based on its view that 47 U.S.C. § 230 was inapplicable to the dispute because Cremers was not a "true internet service

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[1] While Respondent objects to many of Petitioner's other "factual" allegations, most are not relevant to the issues presented in the Petition, so Respondent declines to respond to them here. Respondent further notes that because discovery was halted by the filing of Respondent's anti-SLAPP motion, there has been little factual development on many issues raised by Petitioner, such as her alleged damages.

provider[], like America Online, that provides individuals with access to the internet." Pet. App. at 84a.

Cremers filed an interlocutory appeal of that ruling, arguing that the District Court's conclusion that Section 230 did not apply to the Cremers was either incorrect as a matter of law or premature in light of the as yet undeveloped factual record. The Ninth Circuit agreed, and vacated the District Court's order. Pet. App. at 46a. In its decision, the Ninth Circuit proceeded in two steps.

First, the Court of Appeals rejected the District Court's conclusion that Section 230 only immunizes services that provide access to the Internet as a whole, and held that Section 230 immunity reaches the type of interactive services provided by Cremers and the Network. In so holding, the Ninth Circuit reached the same conclusion as every other Court of Appeals as well as virtually every other court that has considered the issue – *i.e.*, that Section 230 provides immunity to all of the growing body of interactive services, including Internet discussion groups, bulletin boards, chat rooms, Websites, Web hosting services, auction services and bookstores. *See Green v. America Online (AOL)*, 318 F.3d 465 (3rd Cir. 2003), *cert. denied,* 124 S.Ct. 200, 157 L.Ed.2d 140 (2003) (§ 230 provided immunity to chat room operator which promulgated guidelines for chat room members and reserved right to remove noncompliant postings); *Ben Ezra, Weinstein, and Co., Inc. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000), *cert. denied,* 531 U.S. 824, 121 S.Ct. 69, 148 L.Ed.2d 33 (2000) (§ 230 provided immunity to operator of Internet stock quote service which reserved right to edit and correct materials provided by third parties); *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied,* 524 U.S. 937, 118 S.Ct. 2341, 141 L.Ed.2d 712 (1998) (§ 230 provided immunity to chat room operator). *See also Smith v.*

Intercosmos Media Group, Inc., 2002 WL 31844907 (E.D. La. 2002) (§ 230 provided immunity for Internet service provider who provided domain names to and maintained Websites for third parties); *Gentry v. Ebay, Inc.*, 99 Cal. App. 4th 816 (Cal. App. 2002) (§ 230 provided immunity to operator of on-line auction service); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash App. 2001) (§ 230 provided immunity to operator of on-line bookstore which solicited and published book reviews); *but see Barrett v. Rosenthal*, 114 Cal. App. 4th 1379 (Cal. App. 2004), *review granted*, 87 P.3d 797 (Cal., Apr. 14, 2004).

Second, the Ninth Circuit addressed whether the Smith e-mail had been "provided by another information content provider" as that term is used in Section 230. The Court of Appeals held that Section 230 does not provide immunity when an Internet service provider or user posts information knowing that the information was never meant to be placed on the Internet. Rather, the Ninth Circuit explained that Section 230 provides immunity only when a third party has provided the information under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet. The Ninth Circuit then found that it could not resolve this question on appeal because the factual record was undeveloped, and remanded the case to the District Court for further proceedings.

Petitioner filed a petition for rehearing with suggestion for rehearing en banc, which was denied by the Ninth Circuit. Petitioner then filed this petition seeking a writ of certiorari from this Court. Cremers timely requested and was granted an extension of time within which to file an opposition to that petition, and today timely files that opposition.

REASONS FOR DENYING THE WRIT

The Petition advances no issue that merits this Court's attention. The heart of this case is whether 47 U.S.C. § 230 provides immunity from suit to Website and listserv operators who republish allegedly defamatory statements provided by third parties. The Ninth Circuit followed a long line of consistent precedent which concluded that 47 U.S.C. § 230 provides immunity to a wide variety of Internet services. The Ninth Circuit's application of that precedent to the facts of this case was not inconsistent with any decision of this Court or any other Court of Appeals.

The Ninth Circuit's holding that District Court denials of California anti-SLAPP motions are subject to interlocutory appeal also affords no basis for this Court's review. The California anti-SLAPP statute provides expressly for immediate appeal of any denial of a motion to strike. The California Legislature's stated purpose was to enable qualifying defendants whose free speech rights have been challenged to avoid the burdens of trial. At this point, the Ninth Circuit is the only Court of Appeals to address whether a denial of such an anti-SLAPP motion in a diversity case can be immediately appealed. The Ninth Circuit's decision to allow an interlocutory appeal in these circumstances accords with the long-standing holding of this Court that denials of substantive rights should be immediately appealable under the collateral order doctrine and does not conflict with any decision of this Court or any other Court of Appeals.

IV. The Ninth's Circuit's Interpretation of 47 U.S.C. § 230 Is in Accord with All Other Federal Circuits and Presents No Important Matters for This Court to Decide

The Petitioner raises three issues in challenge of the Ninth Circuit's holdings concerning 47 U.S.C. § 230. The first challenges a holding which was consistent with the decisions of all other Courts of Appeals to have considered the issue. The second involves an issue of first impression, which the Ninth Circuit remanded to the District Court for further factual development. The third involves a question of law that Petitioner never raised before and was not passed on by the Court of Appeals, and hence is not properly before this Court.

A. The Ninth's Circuit's Holding That Section 230 Provides Immunity for Service Providers and Users Who Actively Select Material for Publication Follows Court of Appeals Precedent and Is Consistent with the Text and History of the Statute

1. The Holding Is Consistent with All Other Courts of Appeal and Other Courts That Have Considered the Matter

The Ninth Circuit's holding that Section 230 provides immunity for service providers and users who actively select the material they publish was not a novel decision, but instead followed all other Courts of Appeals that have considered the issue. For example, in *Zeran v. America,* 129 F.3d at 330, the Fourth Circuit held that under Section 230, "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – *such*

as deciding whether to publish, withdraw, postpone or alter *content* – are barred" (emphasis added). The Fourth Circuit in *Zeran* further noted that the term "publisher" as used in Section 230 is a term of art, taken from defamation law, and includes the "choice by an author to include certain information" as well as the decision to "remove" information. *Id.* at 332.

The definition of "publisher" as including Internet services which actively select information was also adopted by the Third Circuit in *Green v. America Online,* 318 F.3d at 471, which cited and adopted the holding of *Zeran* that § 230 bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone, or alter content."

Other courts have also held that Section 230 provides immunity for service providers and users who actively select information for publication. For example, in *Blumenthal v. Drudge,* 992 F.Supp. 44 (D.D.C. 1998), White House staff members brought a defamation action against the well-known online gossip columnist Matt Drudge and America Online, Inc. ("AOL") which published his column on its Website. The District Court noted that AOL was not merely a passive conduit of Drudge's column, but contracted with Drudge and paid him $36,000 per year – Drudge's sole, consistent source of income. *Id.* at 51. Contrary to the Petitioner's claim (Petition at 15), AOL did not merely reserve the right to remove or edit questionable material", but also had the right to "make reasonable changes to . . . content . . . ." *Id.* AOL also actively promoted the Drudge column, issuing, for example, a press release which stated that "[m]averick gossip columnist Matt Drudge has teamed up with America Online." *Id.* However, the District Court held that AOL was still immune under Section 230. The Court stated:

> Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others. In some sort of tacit *quid pro quo* arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted.

Id. at 52. *See also Schneider v. Amazon.Com, Inc.*, 31 P.3d at 42-43 (online bookstore which reviewed and posted reader book reviews and which claimed licensing rights in the posted material held immune); *Gentry v. eBay*, 99 Cal.App.4th 816 (online auction service which assembled and published false information about sport memorabilia provided by vendors held immune).

2. *The Ninth Circuit Decision Is Consistent with the Text and History of the Statute*

The text and legislative history of Section 230 leave no doubt that Congress intended Section 230 to provide immunity to service providers and users who actively select material for publication. First, the express words of Section 230(c) do not distinguish between publishers who actively select versus those who use some other method of publication, but simply state that "*No* provider or user of an interactive computer service shall be treated as the publisher or speaker . . ." (emphasis added). Since Congress did place any restrictions on the types of interactive services or the

publishing methods covered by Section 230, none should be created by the courts.

Second, to limit immunized types of screening to just methods which remove material, as Petitioner argues, would be contrary to one of Congress's primary purposes for enacting Section 230 as stated in the text of the statute itself – *i.e.*, to promote the *development* of new forms of computer interactivity and new forms of screening. The Congressional findings in Section 230(a) note that "[t]he rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens." The Congressional policy statement in Section 230(b) further declares that "It is the policy of the United States—

> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
>
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
>
> (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services . . . .

Because Congress intended in enacting Section 230 to encourage development of new types of interactive computer services, there is no reasoned basis for concluding that

Congress only desired to provide immunity only to services which only delete content from third party submissions.

Third, Petitioner's claim that Section 230 should apply only to large services like Prodigy, CompuServe and America Online and that smaller service providers and users are better able than larger service operators and users to screen material before publication is also not supported by any evidence. Petition at 16-17. As a first matter, this is a policy argument, not an interpretation of the text as written, and as such is appropriately made to Congress, not to this Court. Moreover, it is misguided even as a matter of policy. In fact, large service operators and users arguably are better able to screen submissions than small Websites because they can employ thousands of persons. For example, in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. 1995) – the case that prompted Congress to enact Section 230 – the court noted that Prodigy had over 2 million subscribers and hence was able to employ screeners to remove material that did not comply with Prodigy rules from computer bulletin boards. In contrast, many smaller computer services, like the Museum Security Network, have no full-time employees, and thus have a very limited ability to screen submissions. *See* R0819, 01224, 01248.

B. The "Reasonable Person" Standard Articulated by the Ninth Circuit Concerned a Matter of First Impression in the Courts of Appeals and Has Yet to Be Applied to the Facts of Any Case

This case presented the Ninth Circuit with a fact pattern not at issue in prior cases dealing with Section 230 – how to determine whether information has been "provided" for publication on the Internet by a third party. This issue has not been considered by any other Court of Appeals or State court of last resort. Moreover, after articulating this

objective standard, the Ninth Circuit concluded that the facts had simply not been sufficiently developed at the District Court level to evaluate whether Cremers had acted reasonably in publishing Smith's e-mail and remanded the matter to the District Court for further proceedings. Pet. App. at 46a-47a. Petitioner's decision to file her petition for writ of certiorari has forestalled the factual development that the Ninth Circuit directed. Because the "reasonable person" standard articulated by the Ninth Circuit has yet to be applied in *any* case in *any* court, review by this Court would be premature. Indeed, because the District Court could well resolve Cremer's anti-SLAPP motion on other grounds, a decision by this Court could prove to be no more than a purely advisory opinion.

In any event, recognizing the problems that determining an information provider's often unstated subjective intent would create for Internet service providers and users, the Ninth Circuit correctly concluded that an objective standard should be applied: "a service provider or user is immune from liability under § 230(c)(1) when a third party or entity that created or developed the information in question furnished it to the provider or user under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet . . . ." Pet. App. at 46a.

The Ninth Circuit narrowly-tailored this objective standard to impose the least burdens on the Internet service provider. This standard thus furthers Congress's intent in providing immunity under Section 230(c)(1) – to promote the growth of all types of hitherto unknown Internet services and uses. Pet. App. at 45a-46a. On the other hand, to require Internet service providers and users to obtain express consent from third party providers before publishing material on the Internet, as the Petitioner suggests, would create

affirmative duties simply not found in the text of Section 230(c)(1). Petition at 19. If the Petitioner wishes to legislate such affirmative duties on Internet publishers, her proper recourse is to Congress, not to the courts.

Of course, even if the Ninth Circuit had decided that the subjective intent of the third party information provider should control, the facts here strongly indicate that Smith fully intended to have his e-mail published on the Network. After all, Smith sent an e-mail to the Network, an Internet service he had previously researched and knew specializes in publishing e-mails and other materials on stolen art for use by art security professionals, and requested help from the "organization" regarding "Stolen Art." R0198; Pet. App. at 17a-18a. Smith sent his e-mail to an e-mail address customarily used by other third parties to provide information for posting on the Network. *See* R0362; R0365; R0366; R0370; R0372; R0373; R0374-79, *etc.*

While several days after Smith's e-mail was posted on the Network, and after other e-mails posted on the Network questioned the propriety of his e-mail, Smith feigned "confusion" that his e-mail had been published, nonetheless, Smith "refrain[ed] from posting an apology." R0287, R0294-95. Smith also declared that he was actually interested in hearing any responses from the Network's "contacts" to his e-mail and would be willing to post an additional message to aid in an investigation of the Petitioner. *Id.* Petitioner's insistence that Smith had no desire to publish his e-mail, and indeed opposed its publication, simply does not bear scrutiny. Petition at 6.

C. *Petitioner Did Not Raise the Issue of Distributor Immunity in the Court of Appeals, the Court of Appeals Did Not Address It, and It Is Not the Subject of a Cognizable Conflict*

Petitioner's claim that the Ninth Circuit erred in classifying Cremers as a "publisher" rather than as a "distributor" of the Smith e-mail raises an issue of law that Petitioner did not raise before the Ninth Circuit. Indeed, the Ninth Circuit took specific note of the fact that "[Petitioner] has not argued that Cremers should be treated as a distributor" and stated "[w]e therefore need not decide whether Section 230(c)(1) encompasses both publishers and distributors." Pet. App. at 30a n.10. Because Petitioner did not raise the issue of distributor liability before the Ninth Circuit, and the Court of Appeals did not pass upon it, this issue is not properly before this Court. *See Delta Airlines v. August*, 450 U.S. 346, 362, 101 S.Ct. 1146, 1155, 67 L.Ed. 2d 287 (1981) ("question presented in petition but not raised in the court of appeals is not properly before [the Supreme Court]").

Further, Petitioner's claim that the Court of Appeals erred in classifying Cremers as a "publisher" rather than as a "distributor" contradicts Petitioner's own consistent position in this case that Cremers and his Museum Security Network acted as "publishers" of the Smith e-mail. For example, in her Complaint, Petitioner alleged as follows:

- "The Museum Security Network ("MSN") is a very prestigious and well-regarded organization which *publishes*, several times weekly, a newsletter . . . ." R0003 (emphasis added).

- "Defendant Cremers is the *editor* of the MSN Newsletter." R0004.

- "Cremers . . . *republished* Smith's . . . e-mail message . . . ." R0005 (emphasis added).

- "Between September 10 and September 15, 1999, the Smith e-mail message was *published* continuously, 24 hours a day, on the Internet . . . ." R0008 (emphasis added).

Indeed, the Ninth Circuit specifically noted the fact that "Batzel's complaint refers to Cremers as the "publisher" of Smith's e-mail" Pet. App. at 30a n. 10. The Petition itself does not contain a single cite to the record of any evidence supporting her newly-minted theory that Cremers acted as a distributor rather than a publisher of the Smith e-mail. *See* Petition at 20-24. Because this case simply provides no fact pattern on which a ruling on publisher versus distributor liability could be based, any ruling this Court would render on the issue would be purely advisory.

Finally, Petitioner's claim that a cognizable conflict exists between state courts and an Eleventh Circuit opinion which considered distributor versus publisher liability – *Zeran v. American Online,* 129 F.3d 327 (11th Cir. 1997) *cert. denied* 524 U.S. 937, 118 S.Ct. 2341, 141 L.Ed.2d 712 (1998) – is also misguided. The state court case on which Petitioner relies in pointing to a purported conflict is *Barrett v. Rosenthal,* 114 Cal.App.4th 1379 (Cal. App. 2000). This is not an opinion of the court of last resort in California, but rather an opinion of the California Court of Appeal, and would not constitute a conflict cognizable under Sup. Ct. Rule 10(b) *even if* it differed from the Ninth Circuit decision at issue in this case where distributor liability was never raised. Further, the *Barrett* case has been accepted for review by the California Supreme Court. *See* 87 P.3d 797 (Cal. Apr. 14, 2004). Because the California Supreme Court may resolve the alleged conflict with *Zeran* or resolve the

Barrett case on other grounds, review by this Court of the alleged conflict is premature.

V. The Ninth Circuit's Ruling That the Collateral Order Doctrine Applies to the Denial of an Anti-SLAPP Motion Is a Matter of First Impression Which Merely Applies This Court's Precedent to a New Fact Pattern

The Ninth Circuit was the first Circuit to consider whether a Court of Appeals has jurisdiction to consider an appeal from the denial of a motion to strike bought under the California anti-SLAPP statute. The Ninth Circuit's ruling did not create new law, but merely applied the precedent of this Court on the collateral order doctrine to a new factual situation. It does not conflict with the rulings of any other Court of Appeals, including the First Circuit. As such, there is no reason for this Court to consider this matter.

A. The Ninth Circuit Correctly Applied the Collateral Order Doctrine to the Denial of an Anti-SLAPP Motion Brought Pursuant to a State Statute Conferring Substantive Immunity Against Certain Lawsuits

California's anti-SLAPP statute is specifically designed to permit a defendant to gain an early exit from a lawsuit brought to chill legitimate First Amendment expression. *See* Cal. Code Civ. Proc. § 425.16 (a). This early exit is provided *via* a special motion to strike:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike,

> unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Id. § 425.16 (b)(1). To further shield such a defendant from the burdens of judicial process, the statute provides that "all discovery proceedings in the action shall be stayed" upon the filing of an anti-SLAPP motion. *Id.* at 425.16(g). The statute also provides an immediate right to appeal from the denial of an anti-SLAPP motion. *See id.* 425.16 (j).

The California Legislature's intent was to protect a speaker's right not to stand trial on a weak claim that otherwise might chill protected speech. The right of immediate appeal was provided in the statute expressly to protect the right not to stand trial. *See, e.g.,* Cal. Sen. Judiciary Comm. Rep. on AB-1675, at 4 ("[w]ithout [the right to pursue interlocutory appeal], a defendant will have to incur the cost of a lawsuit before having his or her right to free speech vindicated . . . . If the defendant [is forced to defend the lawsuit and] wins, the anti-SLAPP law is useless and has failed to protect the defendant's constitutional rights"). In keeping with the California Legislature's express intent, the Ninth Circuit recognized that the protection provided by the anti-SLAPP statute is "as a substantive immunity from suit," citing the rule set forth in *Erie R.. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

Because the purpose of the statute is to provide substantive immunity from the burdens of a lawsuit, the Ninth Circuit correctly held that the collateral order doctrine confers jurisdiction upon a Court of Appeals to hear an interlocutory appeal from the denial of an anti-SLAPP motion. As a "practical construction" of the 28 U.S.C. § 1291 requirement that only a final decision may be appealed to a federal circuit court, the collateral order doctrine

provides that a party may pursue interlocutory relief from a pre-judgment order in a limited class of cases. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867, 114 S.Ct. 1992, 1995, 128 L.Ed.2d 842 (1994). To qualify as an order from which an immediate appeal may be taken, a district court decision must (1) be "conclusive," (2) "resolve important questions completely separate from the merits," and (3) "render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Id.*

All three factors were easily satisfied here. The first factor was met because the District Court's denial of Cremer's anti-SLAPP motion conclusively resolved the issue of whether California's anti-SLAPP statute should preclude this lawsuit. The second factor was met because the anti-SLAPP statute specifically dictates that a court's consideration of an anti-SLAPP motion must remain separate from its decision on the merits of the underlying claim. *See* Cal. Code Civ. Proc. § 425.16 (b)(3) ("If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case . . ."). The third factor was met because the consequences of an improper denial of Cremer's anti-SLAPP motion – forcing Cremers to go through the difficulties of trial – cannot be remedied after trial. In determining whether a ruling is unreviewable, this Court has "insisted that the right asserted be one that is essentially destroyed if its vindication must be postponed until trial is completed." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499, 109 S.Ct. 1976, 1978, 104 L.Ed.2d 548 (1989). One such right is the right not to be tried. *Id.*

To determine whether a right not to be tried is implicated, this Court makes a "crucial distinction between a right not to be tried and a right whose remedy requires the

dismissal of charges." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 109 S.Ct. 1494, 103 L.Ed.2d 879 (1989) (internal quotation marks and citation omitted). For example, the collateral order doctrine is not applicable to the denial of jurisdictional challenges – such as the personal jurisdiction example proffered by Petitioner – which, if successful, would have resulted in dismissal. Petition at 26. *See, e.g., Lauro Lines*, 490 U.S. at 500, 109 S.Ct. 1979. Rather, the right not to be tried must "rise to the level of importance needed for recognition under § 1291". *Digital Equip. Corp.*, 511 U.S. at 878, 114 S.Ct. 2001.

Fatal to Petitioner's argument, this Court has consistently held that "*an explicit statutory* or constitutional *guarantee that trial will not occur*" rises to the level of importance necessary to trigger application of the collateral order doctrine. *Midland Asphalt Corp.*, 489 U.S. at 801, 109 S.Ct. 1499 (emphasis added); *see also Digital Equip. Corp.*, 511 U.S. at 874, 114 S.Ct. 1999. Fundamental to this holding is the concept that "[w]hen a policy is embodied in a constitutional or statutory provision entitling a party to immunity from suit (a rare form of protection), there is little room for the judiciary to gainsay its 'importance.'" *Digital Equip. Corp.*, 511 U.S. at 879, 114 S.Ct. 2001.

The Ninth Circuit correctly recognized that the California anti-SLAPP statute is expressly "designed" to protect a defendant from having to litigate meritless cases aimed at chilling First Amendment expression. Pet. App. at 26a. In other words, the anti-SLAPP statute is a classic example of "*an explicit statutory . . . guarantee that trial will not occur*" which this Court has stated is covered by the collateral order doctrine. *Midland Asphalt Corp.*, 489 U.S. at 801, 109 S.Ct. 1499 (emphasis added). There simply is no reason for this Court to grant certiorari to review an application of the collateral order doctrine that fits so plainly within this Court's established jurisprudence.

B. *The Ninth Circuit's Ruling Does Not Conflict with Any Decision of the First Circuit*

The Ninth Circuit's decision that a denial of an anti-SLAPP motion is immediately appealable was based on the standards regarding the application of the collateral order doctrine set forth by this Court in *Digital Equip. Corp.*, 511 U.S. 863, 114 S.Ct. 1992. Pet. App. at 25a. After concluding the collateral order doctrine permitted immediate appeal, the Ninth Circuit compared the substantive immunity from suit afforded by California's anti-SLAPP statute to other substantive immunities from suit to which the collateral order doctrine has been applied, such federal statutes of repose or qualified immunity. Pet. App. at 27a. Contrary to Petitioner's argument, the Ninth Circuit's conclusion from these cases that collateral review was appropriate does not create a conflict with the decision of the First Circuit in *Lovell v One Bancorp.*, 878 F.2d 10 (1st Cir. 1989) warranting this Court's review Petition at 24-25.

As an initial matter, this Court has held that the collateral order doctrine can apply to claims of qualified immunity.[2] *See Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). In *Lovell*, the First Circuit did not purport to challenge this Court's holding in *Mitchell* that orders denying qualified immunity can be immediately appealable. Rather, the First Circuit merely carved out an exception to this rule for particular litigants whose claims for qualified immunity do not implicate the policy reasons that would typically justify an immediate appeal. *See Lovell*, 878 F.2d at 13.

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[2] Although qualified immunity does not explicitly arise from statute, this Court has determined that it is a substantive immunity that can rise to the level of importance necessary to trigger the collateral order doctrine. *See Digital Equip. Corp.*, 511 U.S. at 875-78.

The applicability of the collateral order doctrine in this case simply does not depend on the public policy issues at stake in cases involving absolute or qualified immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Rather, the applicability of the collateral order doctrine here rests on the fact that the California anti-SLAPP statute provides "an explicit statutory or constitutional guarantee that trial will not occur." *Midland Asphalt Corp.*, 489 U.S. at 801, 109 S.Ct. 1499. As such, nothing in the legal reasoning or holding in the *Lovell* decision has any relevance to the Ninth Circuit's reasoning or holding in this case.

CONCLUSION

For the reasons stated above, Respondent Ton Cremers respectfully requests that this Court deny Petitioner's petition for a writ of certiorari.

Dated: May 5, 2004

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